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No. 89-5916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD S. DEMAREST,

Petitioner,

v.

JAMES A. MANSPEAKER, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Respondents, having failed to so much as enter an appearance below, advance for the first time in their brief here two new contentions that would deny Petitioner his fee. First, Respondents contend this Court may avoid the merits of Petitioner's claim under 28 U.S.C. § 1821 because, they assert, he failed to satisfy two requirements of 28 U.S.C. § 1825. Second, Respondents argue that Petitioner was not "in attendance" at the trial because the procedure used to compel his attendance was a writ rather than a subpoena, an interpretation of 28 U.S.C. § 1821 that has not occurred to any court construing the statute.

Respondents' first contention is not within the scope of review granted by this Court, and, in any event, is not fairly supported by the record. Their second contention is simply a novel and unsupported attempt to evade the ordinary meaning of the statutory language.

I. Respondents' Belated Efforts To Avoid The Merits Of Petitioner's Claim Should Be Rejected

Respondents' first contention is that Petitioner failed to satisfy two requirements of 28 U.S.C. § 1825 (Resp. Br. at 8-9) merely because his *pro se* pleadings (Resp. Br. at 6) do not recite compliance with them.[1] This belated effort to

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[1] Respondents identify two "requirements." One is that Petitioner must have been summoned by a subpoena rather than by a writ of habeas corpus ad testificandum. This is, in reality, not a claim of pleading deficiency but a repetition of Respondents' substantive contention regarding the proper reading of sections 1821 and 1825, and is responded to *infra* in section II. The second asserted requirement is that Petitioner have obtained an affidavit regarding his attendance from the attorney for the criminal defendant who called him as a witness. Resp. Br. at 8.

avoid the merits of Petitioner's claim is both untimely and mistaken.

The new issue Respondents present differs substantially from the question presented by the petition for certiorari, which raised only 28 U.S.C. § 1821,[2] and it is not fairly included within that question. For this reason alone, the Court should decline to consider it. Sup. Ct. R. 14.1(a). Moreover, the record in this case contains no mention of this issue. Nor was it mentioned by the district court or the court of appeals (or, for that matter, by Respondents in their brief in opposition to certiorari).

In *Lytle* v. *Household Mfg., Inc.*, 110 S.Ct. 1331 (1990), decided last term, this Court adhered to its usual rule and declined to consider a claim which was neither included in the grant of certiorari nor raised below. *Id.* at 1336 n.3. *See also Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980); *Federal Trade Comm'n* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983). Respondents do not suggest that this case presents an exception to the usual rule, and provide no explanation for their failure to raise the issue below.

Additionally, Respondents are mistaken that "petitioner's own pleadings" fail to show his entitlement to a witness fee under 28 U.S.C. § 1825, Resp. Br. at 6, and that there is therefore an alternative ground "in the record" for affirmance. Resp. Br. at 9 n.4. Petitioner's Petition and Complaint below, prepared *pro se*, specifically stated his claim to a fee under 28 U.S.C. § 1825. *E.g.*,

[2] Respondents concurred. Their brief in opposition to certiorari stated the Question Presented as follows: "Whether a state prisoner who serves as a witness in federal court proceedings is entitled to a witness fee under 28 U.S.C. 1821?"

Joint Appendix, pp. 3, 4, 5.[3] Although the claim may have been inartfully pleaded, Petitioner's pleading was plainly sufficient to allege compliance with the procedural requirements of section 1825 under the "notice pleading" standards of the federal rules endorsed by this Court. *See Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957). Moreover, Respondents made no motion for clarification, or indeed, any response at all to Petitioner's pleadings. Respondents are incorrect in saying this record provides an alternative basis for affirming the judgment below.

II. Section 1821 Does Not Require A Witness To Be Subpoenaed To Be "In Attendance" At Trial

Respondents' principal contention, offered here for the first time, is that only a witness responding to a subpoena is "in attendance" and therefore entitled to be paid a witness fee under section 1821, since Petitioner was brought to court pursuant to a writ of habeas corpus ad testificandum, he does not qualify.[4] This theory does not withstand examination. It is contradicted by this Court's opinion in *Hurtado*, is inconsistent with other judicial

[3] Petitioner alleged in his complaint that the defendant clerks had "the duty . . . of certifying to the United States Marshal an affidavit respecting Plaintiff-Petitioner's court attendance." Joint Appendix, p. 3. Beyond this, the record is silent regarding an affidavit of Petitioner's attendance at Court.

[4] At times Respondents appear to argue that Petitioner is additionally required to meet a "subpoena" requirement imposed by 28 U.S.C. § 1825, governing the procedure by which defense witnesses are compensated. Resp. Br. at 11. Apart from the fact that this question was not raised below and certiorari was not granted to review it, Respondents offer no reason why the word "subpoena" should not be broadly defined to include all forms of compelled attendance. See discussion, *infra*, at 8-9.

decisions, and lacks any firm basis in the history of the statute.

A. Hurtado Contradicts Respondents' Interpretation of "In Attendance"

Section 1821 grants a fee to "a witness in attendance" at a trial. Respondents would define "in attendance" as incorporating a subpoena requirement, citing this Court's opinion in *Hurtado v. United States*, 410 U.S. 578 (1973), as support for their view. Precisely the opposite is true. As the *Hurtado* opinion makes plain, the witnesses in that case were not brought to court by subpoena. 410 U.S. at 579 and n.1. In fact, they were arrested for failure to post bond pursuant to former Rule 46(b) of the Federal Rules of Criminal Procedure, *committed to the custody of the United States Marshal, incarcerated by the marshal and produced by him at trial to provide testimony. Id.* This Court expressly held that such witnesses are "in attendance" at trial.[5]

Recognizing the inconsistency in their position, Respondents later admit that the witnesses in *Hurtado* were not summoned to court by subpoena. Resp. Br. at 13

[5] "We conclude that a material witness who has been incarcerated is entitled to the $20 compensation for *every day of confinement during the trial* or other proceeding for which he has been detained. On each of those days, *the two requirements of the statute are satisfied—there is a court in session and the witness is in necessary attendance.*" 410 U.S. at 586-87.

It should be emphasized that the holding referred to in *Hurtado* was based on the witnesses' rights under the general witness fee statute, the precursor of section 1821(b), and *not* on the special provision for detained material witnesses, the forerunner of section 1821(d)(4). Thus the Court's analysis of "in attendance" was not based on any special provision applicable only to detained material witnesses.

n.7. At that point, Respondents retreat to a view that, while a subpoena is not required, the process used must be "something like" a subpoena: "[A] detained material witness is 'in attendance' at the court before which he is to testify, since he is summoned by a process that *in effect amounts to* service of a subpoena." *Id.* (emphasis added). Even assuming that some form of compulsory process may be necessary,[6] Respondents do not explain why the detention procedure at issue in *Hurtado* is more like a subpoena than the writ of habeas corpus ad testificandum employed here.

Respondents' argument is simply unconvincing. If Petitioner Demarest had not been a convicted prisoner and had been subpoenaed to testify he would be entitled to a fee. If he had been detained as a material witness he would have been entitled to a fee. But because he was in prison, and therefore was summoned pursuant to a writ of habeas corpus, he is not.

Respondents' rationalizations, offered to justify a result which has no basis in common sense or in the operative language of the statute, are simply proxies for the propo-

[6] Both subsections (a) and (b) of section 1825 refer to "subpoenas issued on approval of the court." The common-sense purpose of this language is not to insist upon the use of a writ of subpoena rather than some other instrument, but rather to insure that defense witnesses called at the government's expense have been determined by the court to be material and necessary under the procedure described in Fed. R. Crim. P. 17(b). *See* S. Rep. No. 615, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 2901-04 (explaining need to conform section 1825 and Rule 17(b)); H.R. Rep. No. 99-417, 99th Cong., 2d Sess. 18 (1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 6165, 6180. Under Rule 17(b), courts issue both subpoenas and writs of habeas corpus ad testificandum for necessary defense witnesses. *See* p. 7, *infra*.

sition that prisoners are not entitled to fees because they do not deserve to be paid. That may be the view of the Respondents, but it is not a limitation enacted by Congress.[7]

B. Respondents' Interpretation Is Inconsistent With Judicial Decisions Concerning Witness Fees

Respondents cite no judicial decisions holding that a witness' right to attendance fees depends on the precise form of compulsory process used to secure his presence.[8] In fact, cases on this and related subjects suggest just the opposite conclusion.

None of the reported cases concerning prisoners holds them ineligible for fees under section 1821 because they appeared pursuant to a writ rather than a subpoena. *See* Pet. Br. at 30-32. Moreover, in cases dealing with taxation of costs under section 1920 of Title 28, the issuance of a subpoena is not a prerequisite to assessing witness fees. J. Moore, W. Taggart & J. Wicker, 6 *Moore's Federal Practice* ¶ 54.77 [5.-1] at 54-436 (2d ed. 1988). For example, in *Castro* v. *United States*, 104 F.R.D. 545, 549-50 (D. Puerto Rico), *aff'd*, 775 F.2d 399 (1st Cir. 1985), a civil case, the court held that a witness who was not even subpoenaed (because he was beyond the 100-mile reach of the court's subpoena power) was statutorily entitled to receive witness attendance fees under section 1821(b), and thus that defendant could tax the cost of such fees to plaintiffs. *See also Dasher* v. *Mutual Life Insur. Co.*, 78 F.R.D. 142 (S.D. Ga. 1983).

In criminal cases under Fed. R. Crim. P. 17(b), federal courts routinely equate the term "subpoena" with "writ of habeas corpus ad testificandum" in connection with compulsory process to prisoner witnesses. *E.g.*, *United States* v. *Greschner*, 802 F.2d 373 (10th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987) (affirming trial court's denial of defendant's application to "subpoena" three inmate witnesses while granting application to "subpoena" others); *United States* v. *Fountain*, 768 F.2d 790 (7th Cir.), *amended by* 777 F.2d 345 (7th Cir. 1985) (affirming trial court's denial of defendant's request to "subpoena" prison inmates under Rule 17(b)); *United States* v. *Garza*, 664 F.2d 135 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982) ("appellants sought to subpoena inmates from various correctional facilities"); *United States* v. *Herron*, 551 F.2d 1073 (6th Cir. 1977) (affirming district court's refusal to issue a "subpoena" to inmate witness); *United States* v. *Plemons*, 455 F.2d 243 (10th Cir. 1972) (using both terms, alternately and interchangeably, in referring to compulsory process for inmates). While there is technically a difference in the two forms of process, it is plain from these cases that federal courts consider them synonymous.[9]

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[7] Respondents liken prisoners to parties in a lawsuit, and suggest that both are ineligible for fees because they do not "attend" the trial. Resp. Br. at 10. Petitioner believes the analogy is far-fetched, and submits that parties are ineligible for the simpler reason that a party is not understood to be a "witness" in the ordinary meaning of that term, even if he testifies. "A real party in interest or a party suing or sued in a representative capacity *is not a witness* for the purposes of the statute, even though he may actually testify at the trial." J. Moore, W. Taggart & J. Wicker, 6 *Moore's Federal Practice* ¶ 54.77[5.-1] at 54-432 (2d ed. 1988). The statute referred to is 28 U.S.C. § 1920, which permits taxation of costs for "fees and disbursements for . . . witnesses." A witness, unlike a party, is a person who is before the court only to give testimony. Petitioner plainly satisfies that definition.

[8] A possible exception is a state attorney general's opinion in 1921, cited in the final footnote of Respondents' brief, which at least mentions the distinction.

[9] Indeed, Fed. R. Crim. P. 17(b) in express terms authorizes only

C. Nothing In The History Of The Witness Fee Statute Supports The Analysis Or Result Urged By Respondents

Respondents trace the 200-year history of the witness fee statutes and refer to numerous legislative and administrative materials associated with that history. Nothing in the cited documents, however, sheds any direct light on the question at issue. Neither Respondents' peculiar definition of "attendance" nor the result they advocate finds any direct support in this ancient record.

Respondents' reliance on these materials is suffused with conjecture and suggestion. Thus, "a number of state laws [in 1807] *suggest* a practice of excluding prisoner witnesses," Resp. Br. at 15 n.11; prisoners "*do not appear to be* the sort of witnesses" entitled to compensation, *id.*; "Congress's use of the term 'summoned' *appears to* have restricted the statute's reach to those witnesses . . . produced by subpoena *or its equivalent*," *id.* at 17; "the express extension of witness fees to . . . detained material witnesses . . . strongly *suggests* . . . that other imprisoned witnesses" were not considered entitled to fees, *id.* at 18; and etc. This discussion is replete with assertions that prisoners have not been "regarded" or "contemplated" as entitled to fees, *e.g.*, Resp. Br. at 13, 17, in an effort to attribute to Congress a deliberate intention for which direct evidence is conspicuously absent. Respondents' formulations demonstrate forcefully the utter lack of any real basis in the legislative

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the issuance of subpoenas, but courts regularly issue writs pursuant to the rule without even discussing the difference, implying that the two are considered functional equivalents by the courts.

history to contradict the plain and evident language of the present statute.[10]

While admitting that their argument based on congressional inaction is a "poor substitute" for actual evidence of Congress' intent, Respondents nevertheless insist that the argument should be given some credence when the existing decisions and practice are "familiar, uniform and longstanding." Resp. Br. at 25. As Petitioner pointed out in his opening brief (at 37-41), there is not the slightest hint that Congress was ever aware of the existence of the decisions and practice referred to by Respondents, or that anyone was "familiar" with them beyond the few parties directly involved. In such a case, the Court cannot attribute a fictional awareness to Congress. *Securities and Exchange Comm'n* v. *Sloan*, 436 U.S. 103, 121 (1978) ("We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents."). *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); *United States* v. *Calamaro*, 354 U.S. 351, 358-59 (1957).[11]

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[10] Respondents' brief omits any reference to the only two amendments in the statute's history which might have any direct bearing on prisoners' right to fees. In 1926, a phrase was inserted in the statute which could fairly be read to except prisoners from witness fees. *See* Pet. Br. at 40-41 and n.17. In 1948, that possible exception was removed. *Id.* It is telling that, in more than ten pages of argument concerning the statute's history, Respondents have nothing to say about these amendments.

[11] Finally, Respondents urge that Congress was "legislating against a background" in which prisoners have never "been deemed eligible" for witness fees. Resp. Br. at 25. This argument only begs

The final thirteen pages of Respondents' brief can be condensed to a single proposition which Petitioner does not dispute: it has not been administrative practice to pay witness fees to prisoners when they are summoned to court to testify. The question before the Court is whether that practice can be reconciled with the statute.[12] Petitioner submits that it cannot.

CONCLUSION

For the reasons set forth in Petitioner's opening brief, and here, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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the question whether prisoners are *entitled* to receive fees under the statute. Respondents have pointed to no evidence whatsoever that prisoners were ever "deemed ineligible" by Congress. Moreover, Congress is always "legislating against a background" of some kind, but that mere fact cannot be taken to mean that Congress enacts the entire landscape into law, particularly scenery which is invisible beyond the horizon.

[12] Respondents do not argue that administrative practice in this case is entitled to any special deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).